In the Supreme Court of the United States.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
LUCINDA GRIZZARD, WILLIAM GRIZZARD, Mrs. Lila Chaney and Wilson Chaney.
No. 66.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This suit was instituted under the provisions of the act of March 3, 1887 (24 Stats. L., 505), commonly known as the Tucker Act, the second section of which confers jurisdiction upon the circuit and district courts of the United States concurrently with that of the Court of Claims.

Defendants in error owned a farm in Madison County, Ky., containing 86 acres, more or less. On the south it was bounded by what is known as Tates Creek, a tributary to the Kentucky River. A county road, known as the Forest Hill road, coming generally

from a northeasterly direction, formed the eastern boundary of said farm, and after crossing a ford across Tates Creek continued south a few hundred feet to join with the Tates Creek pike.

For the purpose of improving its navigable capacity the United States Government, in December, 1903, constructed in and across the Kentucky River a lock and dam, known as "Lock and Dam No. 9," the effect of which was to raise and force back the waters of said river into Tates Creek and permanently overflow 7½ acres of the bottom lands of defendants in error and at the same time render Tates Creek unfordable at the point where it is crossed by the county road, by reason of the depth of the water standing therein.

There does not appear to have been any obstruction to traffic on the county road north of the ford, but those desiring to reach Tates Creek pike were obliged thereafter to use a small ferryboat maintained at the ford by defendants in error for foot passengers, and vehicles were required to pass in a more or less circuitous route, the distance being much greater than before the destruction of the ford.

The trial court rendered judgment for $750, the value of the 7½ acres of land permanently submerged or taken, and a like amount for the damage caused by the so-called taking of an easement of access from the land of defendants in error by way of the county road to Tates Creek pike. (Rec., 12, 13.)

THE ISSUE.

The assignments of error are addressed wholly to that portion of the judgment making allowance of $750 by way of damage for the destruction of the so-called easement in the county road. (Rec., 14.) No issue is raised as to the allowance for the 7½ acres of land permanently overflowed.

ARGUMENT.

NO TAKING WITHIN THE MEANING OF THE FIFTH AMENDMENT.

This suit is predicated upon that clause of the fifth amendment to the Constitution prohibiting the taking of "private" property for public use without just compensation.

The decisions are practically uniform in holding that the closing of a public highway, such as streets, roadways, alleys, etc., when done under and pursuant to authority conferred by a valid act, and where there has been no want of reasonable care or skill in the execution of the power, does not constitute a taking of *private property* within the meaning of the Constitution. This is especially true where ingress and egress to and from land has been closed in but one direction. At most, the damages arising therefrom have been held to be consequential and not actionable.

There is no similarity between the facts in the case at bar and those of *United States* v. *Welch*, decided by this court at the last term (217 U. S., 333). In the latter, Welch was the possessor of a right of way, or easement, over the land of one Sewell, which was

the only practical outlet to the county road, whereas in the case at bar the land abuts the county road, which, as heretofore stated, is obstructed in only one direction.

On the question of vacating or closing a street so as to cut off access to property in one direction, Lewis, in his work on Eminent Domain (3d ed., sec. 202), says:

> Whether one may recover compensation when the street in front of his property is closed or vacated between his property and the next connecting street on one side, so as to cut off access in that direction, while leaving access in front and in the other direction unimpaired, is one of the vexed questions of the law. A leading case on the question is that of *Smith* v. *Boston* (7 Cush., 254), decided by the supreme court of Massachusetts. The street on which the plaintiff abutted was vacated near to but not in front of his property. He had access in the other direction. The case was a petition for damages under the statute, which was as follows: "If damage shall be sustained by any persons in their property by the laying out, altering, or discontinuing any highway, the commissioners shall estimate the amount of damage sustained by such persons, and in their return shall state the share of each separately." "In estimating the damages sustained by any person in his property by the laying out, altering, or discontinuing of any highway, the jury shall take into consideration *all the damage done to the complainant*,

whether by taking his property or by injuring it in any manner, and they shall also allow, by way of set-off, the benefit, if any, to the property of the complainant by reason of such laying out, alteration, or discontinuance." The language of the statute could hardly be more comprehensive, but the court held that the plaintiff did not sustain damage within the meaning of the statute, though his property was depreciated in value by the discontinuance of the street. * * * This case has been approved and followed in many subsequent cases in the same court involving similar facts and has exerted a marked influence upon the law of the country. It is now the settled doctrine in Massachusetts that property is not damaged within the statute by the vacation of a street or highway unless it abuts upon the part of the street vacated or is cut off altogether from the general system of highways. The doctrine is admitted to be harsh in some cases, but is adhered to as affording a definite and practical rule and on the ground of *stare decisis* and the acquiescence of the legislature. Many other courts follow the Massachusetts doctrine and hold that when access to property is cut off in one direction by the vacation or closing of the street upon which it abuts, but may be had in the other direction, the property is not taken or damaged within the meaning of constitutions or statutes giving compensation. * * *

Keasy v. *City of Louisville* (4 Dana, 154) was an action on the case to recover damages. Plaintiff was the owner of a lot in Jefferson street, in the city of

Louisville, upon which he had erected a small house. Thereafter the city elevated the grade of the street about 3 feet, in consequence of which plaintiff was required to fill up his lot, reconstruct his house, and in other respects was subject to inconvenience and damage. The court, among other things, said:

> If the city possess the power to shut up Jefferson street, and should exercise it, the reclusion would subject the plaintiff and others also to much more inconvenience and actual loss than any which could have been occasioned by the elevation of the grade; but, the power conceded, a legal right to damages for the total obliteration of the street could not be maintained. It would be *damnum absque injuria*, loss, not injury—inconvenience, not wrong—to which every citizen must submit, and to something like which every citizen does submit, for the public good.

In *Louisville & Frankfort R. R.* v. *Brown* (17 B. Mon. Ky., 763) it appears that the railroad company, under proper authority, constructed along the center of the street in front of plaintiffs' lot a wall 12 feet in width and 4 feet high, at the western end of the lot; that the erection of the wall had greatly injured their lot and building and impaired their value; that it had deprived them of the use of a greater portion of the street and interfered with the use and enjoyment of the remainder; that the wall had entirely obstructed the crossing of said street in front of their lot and hindered the plaintiffs in their lawful use of the same. After citing numerous authorities to the

effect that no action would lie for such injury, the court said:

> The current of authority upon this point, swelling with the accessions to which the introduction of the railroad system upon an extended scale has given rise in the courts of almost all the States, is unbroken. It may be assumed as true that some portion of every railroad in the Union runs through the street of a city, town, or village, and in all the litigation which has resulted we have met with no case recognizing a different doctrine, except where the general prinicple has been modified by some statutory enactment. Reason and justice, no less than judicial authority, sanction the principle. No right of property is invaded; no property of the appellees has been taken for public use without compensation. Their right to the use of the street, even according to the most comprehensive definition of that right, is held and must be exercised in subjection to the equally well-established right of the municipal power of the town or city to make such appropriation of the streets as, in their opinion, will best promote the interests and business of the local community (pp. 777, 778).

See also *Wolfe* v. *C. L. R. R.*, 15 B. Mon. (Ky.), 404; Cooley Const. Lim. (6th ed.), pp. 473, 666, 669; Dillon Mun. Corps., sec. 987; Sedgwick Stat. and Const. Con. (2d ed.), pp. 456, et seq.

It will be noted that the authorities quoted proceed upon the idea of a *damage* to real estate. In the

very nature of things defendants in error must show something more than damage to bring the suit within the jurisdiction of the court under the act of March 3, 1887. In other words, they can not be content with alleging and proving mere damages arising out of the commission of a tort, but must show that there has been such a taking of *private* property for public use as is inhibited by the fifth amendment to the Constitution. Neither can they, by any evasion in pleading, create an action *ex contractu* out of one purely sounding in tort (149 U. S., 593; 188 id., 400). It has not been alleged, nor can it be presumed as a matter of law, that they possessed any individual property right in a public road of Madison County. Whatever rights that county and the State of Kentucky may have in this thoroughfare need not here be discussed, because they are not parties to this proceeding.

It is submitted that the trial court erred in awarding defendants in error the sum of $750 as damages by reason of the taking of a so-called easement in the county road, and the case should, therefore, be remanded with instructions to revise its judgment accordingly.

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